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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAIME IBARRA, Defendant and Appellant.	D074167 (Super. Ct. No. JCF36251)

APPEAL from a judgment of the Superior Court of Imperial County, Poli Flores Jr., Judge. Affirmed.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury trial, Jaime Ibarra was convicted of one felony count of attempted perjury (Pen. Code, § 118, subd. (a), 664).[1] On appeal, Ibarra contends there is insufficient evidence to sustain his conviction. As we explain, the evidence presented at trial was sufficient for a reasonable jury to conclude that Ibarra committed attempted perjury. Affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2015, Ibarra was employed by Management and Training Corporation (MTC) as a detention officer at the Imperial Regional Detention Facility. On January 25, 2017, he reported an ankle injury to his supervisor, and was asked to write a memo detailing the incident. In the memo, Ibarra reported that the incident occurred on January 24 between 1:00 a.m. and 2:00 a.m.

Information regarding the incident was also reported to an insurance company in connection with a worker's compensation claim. Between Ibarra's memo, a report from his supervisor, and the information provided to the insurance company, it was MTC's understanding that the incident occurred between 1:00 a.m. and 2:00 a.m. MTC reviewed video footage within the time the incident was reported to have taken place, and saved a one-hour portion of the video from 1:00 a.m. to 2:00 a.m.

Ibarra's worker's compensation claim was denied. As part of the worker's compensation appeal, Ibarra took a deposition under oath. As part of the deposition, Ibarra was asked the following questions and gave the following answers:

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1 Subsequent statutory references are to the Penal Code unless otherwise noted.

"QUESTION: You submitted a report to the employer?

"ANSWER: Yes.

"Q: Okay. And do you know what time you put on that report?

"A: I approximated from three and four o'clock.

"Q: Okay.

"A: From 3:00 in the morning to 4:00 in the morning, within that time.

"Q: Wait a second, that's not it. I know a little bit about military time. You said 1300 to 1400?

"A: No, 0300 to 0400.

"Q: Okay. So you're saying that the incident happened between 3 and 4—3:00 and 4:00 in the morning?

"A: Approximately.

"Q: Okay. Did you previously report to anyone that it happened around 1 o'clock in the morning?

"A: No."

A stipulation was entered into with Ibarra's counsel that if the unsigned original transcript of the deposition was not returned within 60 days, a certified copy could be used for all purposes. Ibarra did not sign and return the transcript. He did, however, have enough time to review it, and did in fact review about half of it. Of the half he reviewed, he did not feel that any changes needed to be made.

The People filed an information on February 16, 2017 charging Ibarra with seven counts of insurance fraud (§ 1871.4, subd. (a)(1)) and three counts of attempted perjury

under oath (§§ 664, 118, subd. (a)). A jury convicted Ibarra of perjury under count 9, which read:

> "On or about the 9th day of June, 2015, said defendant(s), JAIME IBARRA; did commit a FELONY, namely: ATTEMPTED PERJURY UNDER OATH a violation of Section 664/118(a) of the Penal Code of the State of California, in that said: JAIME IBARRA being a person who, having taken an oath that he would testify, declare, depose, and certify truly before a competent tribunal, officer, and person, to wit, P. Susan McCulloch, in a case in which such an oath may by law be administered, to wit, a deposition, did and contrary to such oath state as true a material matter which he knew to be false, to wit: lied at pages 29–30, denying he previously reported his claimed injury ankle injury occurred around 1:00 AM in the morning."

The verdict form for count 9 included a verdict for perjury, which the court took to be a finding of attempted perjury, without objection from either party. The jury could not reach a verdict on all other counts, and the court declared a mistrial as to those counts.

DISCUSSION

At issue in this appeal is whether substantial evidence existed for a reasonable jury to find beyond a reasonable doubt that Ibarra committed attempted perjury when he said in his deposition that he had not previously reported that his injury occurred around 1:00 a.m.

A. *Guiding Principles*

When a conviction is challenged for insufficient evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence

is evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 66 (*Snow*).)

The California Penal Code defines perjury as follows:

> "Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury." (§ 118, subd. (a).)

When an allegedly perjurious statement is made at a deposition, section 124 is implicated. This section provides that a deposition is complete "when it is delivered by the accused to any other person, with the intent that it be uttered or published as true." (§ 124.) Therefore, the instructions given to the jury in this case included the following six elements:

> "1. The defendant took an oath to testify or depose truthfully before a competent person under circumstances in which the oath of the State of California lawfully may be given;
> "2. When the defendant testified, or deposed he willfully stated that the information was true even though he knew it to be false;
> "3. The information was material;
> "4. The defendant knew he was making the statement under oath;
> "5. When the defendant made the false statement, he intended to testify [or] depose falsely while under oath.
> "AND
> "6. The defendant signed and delivered his deposition, to someone else intending that it be circulated or published as true." (CALCRIM No. 2640.)

Although the crime of perjury does not occur until the deposition is deemed complete, this does not prevent the crime of *attempted* perjury from occurring before each element of perjury is satisfied: "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) "The overt act need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but it must approach sufficiently near it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made." (*People v. Fiegelman* (1939) 33 Cal.App.2d 100, 104–105.) "[I]t is also unquestionable that after the intent has been formed and such intent has been coupled with an overt act toward the commission of the contemplated offense, the abandonment of the criminal purpose will not constitute a defense to a charge of attempting to commit a crime." (*People v. Carter* (1925) 73 Cal.App. 495, 500.)

Contrary to Ibarra's argument on appeal, to constitute an attempt a defendant need not attempt each element of the offense. Rather, it is sufficient that the defendant "acts with the requisite specific intent, that is, with the intent to engage in the conduct and/or bring about the consequences proscribed by the attempted crime [citation], and performs an act that 'go[es] beyond mere preparation . . . and . . . show[s] that the perpetrator is putting his or her plan into action' [citation]." (*People v. Toledo* (2001) 26 Cal.4th 221, 230, fn. omitted, quoting *People v. Kipp* (1998) 18 Cal.4th 349, 376 (*Kipp*).) However, "the act need not be the last proximate or ultimate step toward commission of the

substantive crime." (*Kipp*, at p. 376; see also *People v. Memro* (1985) 38 Cal.3d 658, 698 (*Memro*) [" '[W]henever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt' "], overruled on another point as stated in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

The crime of attempted perjury has been recognized by the Second Appellate District. (See, e.g., *People v. Post* (2001) 94 Cal.App.4th 467, 482–483 (*Post*).) Not unlike defendant in the instant case, *Post* involved a defendant employee who applied for worker's compensation, claiming to have been injured at work. (*Id.* at p. 471.) An investigation into the source of her injuries revealed that she had been walking normally, gardening, and moving heavy objects even though she was seen using a cane at her doctor's office and claimed to have back pain that prevented her from doing these and other activities. (*Id.* at pp. 471–473.) Defendant was deposed as part of the worker's compensation claim and was asked about her back pain and the activities it prevented her from doing; she responded that she could no longer do any gardening like she used to. (*Id.* at p. 473.) The jury convicted her of two counts of perjury. (*Id.* at 474–475.)

Because defendant did not sign and return her deposition transcript, the court in *Post* reduced the perjury counts to attempted perjury. (*Post*, *supra*, 94 Cal.App.4th at p. 483.) The court pointed to the recognition of attempted perjury in other states and to California's recognition of various attempt crimes, and concluded that section 664, which punishes attempt of *any* specific intent crime, allows for an offense of attempted perjury. (*Post*, at pp. 480–482.) The *Post* court also pointed to the defendant's motive to lie, the testimony of her false statements, the application of (former) Code of Civil Procedure

section 2025,[2] and the lack of evidence as to defendant's mistake of fact or confusion at her deposition as support for her conviction. (*Post*, at p. 483.)

B. *Analysis*

Turning to the instant case, Ibarra does not contend on appeal that the statements he made about his injury and when he suffered it were immaterial or that he did not know that the statements were false.[3] Rather, Ibarra contends that, because he decided not to commit the last element of the offense—signing and returning the deposition transcript—he was not guilty of the crime of attempted perjury.[4]

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2 Former Code of Civil Procedure section 2025, subdivision (q)(1) allowed a deposition transcript that has not been signed to be given the same effect as if it had been approved of by the deponent: the deposition is deemed final 30 days after the deponent receives it for correction. This statute was repealed as part of a reorganization of the rules governing civil discovery; subsection (q)(1) was incorporated into section 2025.520 of the Code of Civil Procedure without substantive change.

3 In fact, Ibarra admits that the statement that he never told anyone that his alleged injury occurred around 1:00 a.m. was incorrect. Ibarra testified and admitted he had told multiple supervisors that his injury occurred around 1:00 a.m. and had written a report that indicated it occurred between 1:00 and 2:00 a.m. He then was asked whether his statement in his deposition that he never told anyone that the injury occurred around 1:00 a.m. was incorrect. He responded, "I was giving an estimate. Yes, it is incorrect."

4 Ibarra also cites to *People v. Vang* (2001) 87 Cal.App.4th 554, 564 (*Vang*), in contending that "without the delivery of the transcript, it would have been impossible for him to commit the crime of perjury." *Vang* involved a shooter whose conviction for attempted murder was upheld even though the person he was trying to kill was not in the house at the time of the shooting. (*Id.* at p. 565.) Attempt may be punishable even though the ultimate harm is impossible (*ibid*). Impossibility is not at issue here, however. Ibarra did not fail to commit perjury due to circumstances beyond his control that made commission of the offense impossible. His attempt is more akin to the line of cases covering abandonment or incomplete attempts. We therefore do not address this argument other than to reaffirm that a defendant need not commit each act necessary for the completed crime to be convicted of attempt. (See *Kipp, supra*, 18 Cal.4th at p. 376.)

We conclude that *Post* informs our analysis on this issue and that there is substantial record evidence from which a reasonable jury could find beyond a reasonable doubt that Ibarra committed the crime of attempted perjury. Indeed, although the testimony of a single witness may constitute substantial evidence if that testimony is reasonable and credible (see *Snow*, *supra*, 30 Cal.4th at p. 66), in the instant case *multiple* witnesses testified that Ibarra had reported that his injury occurred around 1:00 a.m. or between 1:00 and 2:00 a.m., *including* Ibarra himself.

The record includes evidence that Ibarra's deposition was taken as part of a worker's compensation appeal of a claim that was previously denied, and that the time of the alleged injury was material to the denial of that claim. Evidence was also offered to suggest that Ibarra had incentive to lie about the time that the injury took place, inasmuch as the video evidence for this time period showed no such injury occurred. The defense at trial also did not offer evidence that Ibarra may have been confused or mistaken as to what time he had previously reported the injury as occurring, only that he may have been mistaken as to the actual time the injury allegedly occurred.[5]

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5 On appeal, Ibarra contends that *Post* does not apply because in contrast to the defendant in *Post*, he expressed mistake of fact or confusion during his deposition. Ibarra testified that the reason he answered "no" when asked if he had told anyone that the injury occurred at 1:00 a.m. was because he "gave an estimate." But as noted, Ibarra later admitted that he had previously told supervisors that the injury occurred between 1:00 a.m. and 2:00 a.m., or that it occurred around 1:00 a.m. He testified that he was wrong about the estimate he previously gave and that he corrected this estimate during his deposition, indicating some mistake or confusion as to the actual time of the alleged injury. He did not, however, claim that he was confused or mistaken at his deposition as to what time he had previously reported the injury as occurring.

Moreover, the attorney who took Ibarra's deposition testified that it was standard practice for him to give deponents 60 days to correct and return the deposition transcript before it could be used against them for all purposes, and that he entered into a stipulation with Ibarra's attorney to this same arrangement.[6] Ibarra also testified that he had time to review and sign the deposition, that he reviewed about half of it, and that he did not feel any changes needed to be made to the portion he had reviewed.

Based on such record evidence, a reasonable jury could conclude that, by lying at the deposition and subsequently reviewing part of the deposition transcript without finding any errors he wanted to correct, Ibarra's actions constituted an unequivocal act in furtherance of the crime of perjury as well as an intent to commit the crime. Ibarra's failure to sign and return the transcript thus does not absolve him of liability for attempted perjury; substantial evidence shows his actions went beyond mere preparation and were sufficient to constitute an attempt to put his plan into action. (See *Kipp, supra,*

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6 We note that Code of Civil Procedure section 2025.520, subdivision (f) allows a deposition transcript that has not been signed to be given the same effect as if it had been approved of by the deponent. This statute does not alter section 124's requirement that the deposition be delivered before a deponent can be convicted of perjury, as opposed to *attempted* perjury. (See, e.g. *Post, supra,* 94 Cal.App.4th 479; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1248–1249.) It may, however, be a factor when considering Ibarra's intent when he failed to sign the transcript and when he considered the consequences of not signing it, because this provision applies to worker's compensation proceedings. (Cal. Lab. Code, § 5710, subd. (a).)

18 Cal.4th at p. 376.) Contrary to Ibarra's assertion, the jury could have reasonably concluded that Ibarra "wished to have his deposition transcript signed or circulated."[7]

Ibarra argues in his reply brief that the court should interpret section 118 to require a defendant to attempt to sign and return the transcript to be convicted of attempted perjury, because this would encourage reflection and discourage signing and returning the transcript when there are doubts as to its veracity. This is true in the sense that the delivery requirement encourages deponents to review the transcript and commit to its accuracy before delivering it, and allows them to avoid committing perjury if they fail to do so. However, the delivery requirement does not shield a deponent from liability for *attempted* perjury simply because he or she decides not to deliver it; the deponent still acquiesces to the transcript as recorded. (See *Post*, *supra*, 94 Cal.App.4th at p. 483.)

In contrast to Ibarra's proposed interpretation of the statute, we decline to adopt a rule that would allow a deponent to escape attempt liability by doing nothing to correct false statements already made. To do so would *discourage* both veracity under oath and reflection after false statements have been made. Our interpretation reinforces the sound public policy of requiring a deponent to make corrections to false statements contained in the deposition transcript and deliver these corrections to avoid a perjury or an attempted perjury charge.

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7 A deponent need not have attempted the final step of signing and delivering a deposition transcript to be convicted of attempted perjury, as defendant contends on appeal. (See *Kipp*, *supra*, 18 Cal.4th at p. 376.) However, even *if* we accept the proposition that Ibarra must have attempted to sign or deliver his transcript, he still took a substantial step in doing so by reviewing half of it. (See *Memro*, *supra*, 38 Cal.3d at p. 698.)

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

GUERRERO, J.